FILED
JUN 8 1956
HAROLD B. WILLEY, Cl

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 1[illegible]146

MRS. BETHEL LESLIE ET AL.,
*Petitioners,*

vs.

HOUSTON NATURAL GAS CORPORATION,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners pray that writ of certiorari issue to review the judgment of the Supreme Court of Texas denying petitioners' application for writ of error in the above cause. No opinion was written by the Supreme Court of Texas which denied the application with the observation that it presented no error which required the reversal of the judgment of the Court of Civil Appeals. Ordinarily, such a refusal indicates that the Supreme Court of Texas

does not approve the opinion but does approve the conclusion or judgment reached.

The only opinion written by any court concerning this litigation is reported in *Leslie* v. *Houston Natural Gas Corporation,* 280 S. W. 2d 353, by the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston. A copy of that opinion is set forth in the appendix to this application.

## JURISDICTION.

The date of the judgment of the Supreme Court of Texas denying petitioners' application is November 23, 1955. Petitioners' motion for rehearing in that court was denied March 14, 1956. Petitioners' request to file a second motion for rehearing was denied by the Supreme Court of Texas May 9, 1956. A copy of Petitioners' second motion for rehearing is set forth in the appendix to this petition. It was presented to the court March 23, 1956. That court considered whether they should consider it, until May 9, 1956. The petitioners have no further appellate remedy available to them under the laws of the State of Texas.

The jurisdiction of this court is invoked under 28 U. S. C. A., Sec. 1257 (3).

## QUESTIONS PRESENTED.

I.

Two public utilities, the respondent Houston Natural Gas Corporation and the United Gas Corporation, operating under franchises from the City of Houston have identical rates and identical written contract provisions.

The City of Houston fixes the maximum rates by ordinance but neither the City of Houston nor any other governmental body fixes industrial rates. The petitioners contend that the respondent has no right to charge industrial consumers that have written contracts a lower rate than those who do not have a written contract, all said consumers being in the same classification and the existence and non-existence of a written contract being the sole deciding factor. The utility insists to the contrary.

II.

When neither the City of Houston (except as to maximum rates) or the State of Texas attempt to fix industrial rates and the respondent required industrial consumers to execute an unfair and oppressive written contract drawn entirely in favor of the utility, otherwise consumer is charged an extra high penalty rate, such oppressive and unconscionable conduct is in violation of the Fourteenth Amendment. The State and the City have in effect delegated the power to fix industrial rates unto the utility. This court should grant relief and restrain the utility from charging a higher rate to the non-contract consumers than contract consumers. Petitioners are entitled to the lowest established rate.

III.

Where the respondent wishes to change its industrial rate by publishing a new schedule for industrial consumers, all being in the same classification, and as the written contracts of the various industrial consumers expire (on numerous different dates) respondent demands that such consumers execute an unfair contract at the new higher rate but continues to supply gas to those consumers whose contracts have not expired, at the lower

contract rate when all such consumers are entitled to the lowest established rate which is the contract rate and it is the only lawful rate.

IV.

Petitioners are entitled to the lowest established rate (Rates 202 and 202-L) which are the contract rates and therefore are entitled to a writ of injunction as a matter of law because respondent's new rate 303 is not the lowest rate established and maintained by the respondent for industrial consumers and the 404 rate is a penalty rate for those that refuse to sign the unfair written contract demanded by respondent.

V.

Petitioners are entitled to an injunction as a matter of law to prevent the respondent from collecting rates which are not the lowest established rate. Petitioners should not have been required to prove competitive damages, that is, damages by virtue of a competitor having been favored, as a prerequisite to the issuance of any such injunction as held by the Court of Civil Appeals.

## CONSTITUTIONAL PROVISIONS INVOLVED.

The Due Process of Law Clause and the Equal Protection of the Law Clause of the Fourteenth Amendment and the Seventh Amendment to the Constitution of the United States.

## STATEMENT OF THE CASE.

### I. Procedural History of the Case.

Petitioners filed suit for injunction to restrain the respondent from collecting or attempting to collect any charges for gas furnished petitioners as industrial consumers except at the lowest established industrial rate CI-202 or CI-202-L. Petitioners also asked for declaratory judgment as to future obligations. Defendant filed a motion for summary judgment. Petitioners filed a motion for summary judgment. Trial court granted defendant's motion for summary judgment denying Petitioners' motion and holding that the new CI-303 rate was the proper rate from and after March 5, 1951, that the penalty rate schedule CI-404 applied to those industrial consumers who refused to sign a written contract after August 1, 1952, and that the respondent was entitled to recover the difference between the amounts petitioners paid the respondent under rate schedule 202 and 202-L and the amounts which they should have paid, according to the decision under schedules 303 and 404. This first summary judgment was entered December 21, 1953.

Petitioners attempted to appeal from the summary judgment but the Court of Civil Appeals denied the appeal on the ground that the judgment was not final. Petitioners attempted to amend their petition but the amended petition was stricken by the trial court on motion by the respondent. Respondent filed an amended motion for summary judgment and the trial court entered a final judgment thereon.

Petitioners appealed to the Court of Civil Appeals which appeal was denied. Petitioners filed a motion for rehearing which was likewise denied. They applied to the

Supreme Court of Texas for a writ of error which was refused, with the observation that there was no reversible error. The final judgment as entered therefore decreed that the petitioners take nothing and that the respondent recover judgment against each and all of those petitioners in various amounts for the difference between what they had paid under the 202 or 202-L rate and the new 303 rate or the 404 penalty rate.

## II. The Material Facts.

The petitioners are Mrs. Bethel Leslie, a feme sole, B. H. Gillman, George D. Gibson, C. L. Lambert, L. E. Dykes, D. C. Landwehr, L. B. Wolfe, Oscar J. Campbell, Harry Pepper, Standard Rendering Company, Newman Launderette Corporation, John G. Taylor, A. M. Lewis and A. N. Lewis, as partners, S. J. Cutaia and Frank Cutaia as partners, J. E. Burleson, R. R. McKinley, George L. Barr and Lloyd F. Bramble. Certain of the petitioners do business under an assumed name. They total some eighteen separate individuals or entities. All of them are industrial consumers doing business in Harris County, Texas, in which the City of Houston is located. All of them were similarly classified for rate purposes by the utility, that is, as industrial consumers.

The two largest gas utilities doing business in that county are the Houston Natural Gas Corporation and the United Gas Corporation. They sell gas to industrial consumers for identical rates and made identical changes in such rates at the same time. A similar suit is pending against United Gas Corporation.

Rates which petitioners contend are the lowest established rates are set out in schedule CI-202 and CI-202-L established by the utility in 1946. Those rate schedules are set forth in the appendix to this petition. All charges

under each and all schedules involved herein are graduated according to consumer consumption.

About March, 1951, respondent attempted to establish another industrial rate schedule called schedule 303 which applied only to industrial and commercial consumers who did not have written contracts for the rates 202 or 202-L. All three rates applied to the same class of consumers and as written contracts expired for rates 202 and 202-L respondent attempted to induce industrial consumers to sign written contracts under schedule 303.

Many of the industrial and commercial consumers refused to sign the new contracts and insisted upon paying the old rates. Not all of such consumers entered into this suit; for instance, at the time of the entry of the decree in trial court, Memorial Hospital one of the largest hospitals in Houston and the South Main Baptist Church one of the largest churches in Houston were paying under the 202 rates, that is, under the 1946 rates and refused to execute new contracts under the 303 rate but did not join in this suit.

The only basis for assessing the 404 rate was the refusal of the industrial consumer to execute the written contract. If he persisted in his refusal, he was charged the 404 rate which is a very high penalty rate and in certain steps thereof is equivalent to the maximum rate authorized by the City of Houston.

The written contracts offered industrial consumers with reference to the 1946 rates were for definite terms but the new contracts offered to industrial consumers under the 303 rate had a clause in them which the old contracts did not have authorizing the utility to increase its rates at any time on thirty (30) day written notice to the consumer and the only alternative given the consumer was that he could give up the contract.

The map of the City of Houston which is filed as an original record plainly shows that in most instances this was no recourse whatsoever. Affidavits of various of the consumers show that they could not exist economically unless they had cheap fuel such as gas and that the two companies by their combination effectively throttled any resistance. Any charge which they wished to fix they could exact provided it did not exceed the maximum specified by the City ordinances.

The changes of industrial consumers to other rates are summarized in the following chart, viz.:

| Date | No. of Industrial Consumers Served at 202 Rate | Percentage of Consumers Served at 202 Rate under Contract | Percentage of Consumers Transferred to 303, 404 or Ordinance Rates |
|---|---|---|---|
| January, 1951 | 470 | 100 | |
| March 31, 1951 | 347 | 74 | 26 |
| May 31, 1951 | 282 | 60 | 40 |
| August 31, 1951 | 160 | 40 | 60 |
| February, 1952 | 92 | 20 | 80 |
| February 28, 1953 | 38 | 8 | 92 |

Obviously there was an unlawful discrimination in favor of contract holders for several years and there still is. These utilities operate by virtue of franchise from the City of Houston. The State and City have in effect delegated their authority to fix rates unto the utilities as far as industrial consumers are concerned provided they do not exceed the maximum specified in the City ordinances. *Four large industrial consumers are still enjoying respondent's contract rate.*

The final judgment rendered against various of these petitioners in favor of the respondent on its cross-action totalled Twenty Thousand Three Hundred Seventy-five

and 19/100 Dollars ($20,375.19) but if the petitioners are not given relief, obviously the high penalty rate plus further penalty plus interest will make the ultimate recoveries very large. There is nothing to prevent the utility from pressing its claim for these high extortionate rates and changes in the future unless this court grants them relief.

The Court of Civil Appeals in its opinion made no mention of the fact that identical policies and rates are followed in this area by the respondent and United Gas Corporation.

The Court of Civil Appeals in its opinion made no mention of the fact that the 404 rate established about August, 1952, is a penalty rate which exacts a very heavy penalty on those industrial consumers who refuse to execute the utility's unfair printed contracts. If the industrial consumer refuses to pay in excess of the 202 and 202-L rates, he runs the risk of taking a loss far greater than what he will lose if he accepts the 303 rate, because of the exaction of the 404 penalty rate. By these devices the utilities promote their monopoly and discourage resistance on the part of consumers.

## III. Federal Questions Raised in Trial Court and Appellate Courts.

In their original petition petitioners alleged that unless respondent was restrained each of the petitioners would suffer irreparable damage to their businesses and be forced to use substitutes for gas for fuel because of the unlawful discrimination on the part of the respondent; that the respondent insisted that petitioners execute a grossly unfair and unjust contract lacking mutuality which a public utility had no right to require of the industrial con-

sumers and that defendant was continuously annoying and harassing petitioners to induce them to execute these said new unfair written agreements by threats of increasing rates to very high figures together with threats of discontinuance of service which rendered petitioners' business futures and business lives uncertain and which would destroy or tend to destroy entirely the respective business enterprises, all in violation of the law; that petitioners offered to enter into new written agreements the lowest established rate 202 or 202-L and the contract forms theretofore used which offer was refused by respondent.

In the written bill of exceptions to the trial court's summary judgment, petitioners objected that the new contracts and new practices and procedure followed by the Houston Natural Gas Corporation and United Gas Corporation placed the petitioners in a position where they were unlawfully compelled to follow the dictates of said utilities as to rates, changes in rates, new rates and new contracts which petitioners contended were unilateral and tended to create an unlawful monopoly; that a substantial number of petitioners were coerced into signing the new contracts and that petitioners were denied a jury trial by virtue of trial court's sustaining the respondent's motion for summary judgment; and that the unlawful penalty rate 404 was designed to bar petitioners from seeking any relief from the courts because of the threat of heavy losses.

Petitioners in their second supplemental petition and answer excepted to the trial of the case piecemeal by the device of summary judgments thereby denying petitioners the right of trial by jury in violation of the Constitution of the United States.

In the first amended original petition which the trial court refused to allow petitioners to file, they particularly plead that the new printed forms of agreement that the utilities demanded, lacked mutuality and were oppressive and tyrannical contracts and allowed the two principal utilities mentioned by virtue of an illegal combination or trust in restraint of trade to oppress petitioners because they were so located that they could not avail themselves on any reasonable basis of any other gas supply and facilities.

In petitioners' reply to defendant's answer petitioners allege that in August, 1952, the respondent began a course of conduct resulting in a gross unlawful discrimination by insisting that all industrial consumers who refused to sign a written contract on an unfair contract form for the 303 rate be required to pay a still higher rate special bond schedule 404 which in many cases was two or three times the 202 rate and about double the amount charged by the 303 rate; that because of the presently installed equipment and location of mains that the Houston Natural Gas Corporation and the United Gas Corporation control the greatest part of retail distribution of gas to industrial and commercial consumers in Harris County and consequently this course of conduct was designed to further the monopoly of these two utility corporations and was an abuse of their respective franchises.

In plaintiffs' second motion for rehearing presented to the Supreme Court which it refused to consider petitioners particularly pled a violation of the Fourteenth Amendment and referred to a recent decision of this court, *United Gas Pipeline Co.* v. *Mobile Gas Service Corporation*, 76 S. Ct. 373, published in the March 1, 1956, advance sheet of the Supreme Court Reporter. In that decision this court held that the filing of a new rate schedule

with the Federal Power Commission was not sufficient change of rate and that consequently the new schedule did not apply and the contract rate remained the only lawful rate. This decision directly supports our contentions.

## REASONS FOR GRANTING THE WRIT.

Article 1438, R. C. S. of Texas, reads as follows:

> "It shall be unlawful for any such corporation to discriminate against any person, corporation, firm, association or place, in the charge for such gas, electric current or power, or in the service rendered under similar or like circumstances."

It is elementary that gas utilities are given extraordinary privileges or rights in the nature and conduct of their business which is monopolistic in character and consequently are charged by law with the correlative duty of treating all the public alike. Statutes have been enacted in almost every state making this common law rule a statutory one. *City of Houston* v. *Lockwood Investment Co.*, 144 S. W. 685, er. dis.; *City of Texarkana* v. *Wiggins*, 246 S. W. 2d 622.

Respondent's executives do not deny the salient facts. The following quotation from Vice President and General Manager Wimberly's testimony in his deposition emphasizes that the existence or nonexistence of a contract was the only factor which decided whether rates 303 and 404 or 202 and 202-L applied. He testified as follows:

> "Q. In other words, as far as you were concerned, you were willing to furnish the 303 rate without a contract; isn't that right, sir?

A. We were up until August 1, '52, yes, sir, and we were working with the customers all that time to get them to sign contracts.

Q. Since August, 1952, you haven't refused to furnish anybody gas because of the fact that they didn't have a written contract, have you?

A. We would refuse to serve them at the 303 rate if they wouldn't sign a written contract and charge them the 404.

Q. The only difference between their condition before and after that change was the fact that they would or would not sign a contract?

A. I beg your pardon?

Q. In other words, they were getting the 303 rate let's say, up until the summer of 1952. When you put the 404 rate into effect, the customer was in the identical situation that he was before, except that you insisted on him paying the 404 rate because he would not sign the contract; isn't that correct?

A. When we put the new rate into effect in March of 1951, we knew that it was going to take us some time to call on and see and make an explanation to all our customers. That period followed until—we took no final action on it until July. Bear in mind lots of these customers had the contract before them all that time, dated the day we sent it to them. When they wouldn't and if they wouldn't sign by July, we sent them the letter saying 303 will no longer be available after August 1, 1952. We changed the rate schedule at that particular time just like we changed it throughout the years. We put into effect a new rate schedule as of August 1, 1952.

Q. And the only difference between the consumer that you were charging the 404 in those cases that you described and who was previously getting the 303 was that he refused to sign the contract, is that correct?

A. That's the basis that we no longer offer the 303.

Q. In other words, there was no difference between the customer's position or condition or his standing with the gas company before you billed him on the 404 rate and after you billed him on the 404 rate except that he hadn't signed the contract?

A. The only difference—well, I am not sure that this is the correct answer to your question. If not, you ask me again and I will answer it. The difference is that our policy at that time was that we wanted written contracts; that written contracts meant something to us." (Dep. 156-158).

The provision of the new contract which petitioners object to reads as follows:

> "Ninth: Consumer and Seller agree that if at any time, or from time to time, during the term of this contract the rates of Seller applicable to the class of service being furnished hereunder are decreased or increased such decreased or increased rates (other than the increased rates which are provided for in the rate schedule quoted herein which are effective without notice) shall become applicable to the service furnished hereunder thirty days after written notice from Seller to Consumer advising of such decreased or increased rates, provided, however, that in the event the rates applicable to the service furnished hereunder are increased (thereby requiring thirty days written notice from Seller to Consumer as hereinbefore provided in this Ninth Covenant), Consumer shall have the right to terminate this contract upon written notice from Consumer to Seller, such notice to be given not less than fifteen days prior to the date such increased rates are to be effective."

See also 73 C. J. S. 996; *Tippecanoe County* v. *Lafayette R. R. Co.*, 15 Ind. 85.

In *Oklahoma Gas & Electric Co.* v. *Oklahoma Natural Gas Co.*, (Okla.) 205 Pac. 768, it was held that a state corpo-

ration commission had a right to investigate and consider a contract of Oklahoma Gas & Electric Company because public utilities could not enter into contracts that were oppressive, unconscionable or which impaired its obligation to the public. See also *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, (Okla.) 288 Pac. 316; 43 Am. Jur. 590; *Doane* v. *Chicago City Oil Co.*, (Ill.) 45 N. E. 507.

Rate 404 is a penalty rate; it is elementary that equity abhors a forfeiture. The courts will avoid them wherever possible. *Dickenson* v. *Board of Trustees*, 204 S. W. 2d 418, er. ref.; *Supreme Forest Woodman's Circle* v. *Hornsby*, 107 S. W. 2d 393; 19 Tex. Jur. 796.

We submit that the decision of *United Fuel Gas Co.* v. *Public Service Commission*, 80 S. E. 931, by the Supreme Court of West Virginia is a "white horse" case and squarely supports petitioners' contentions.

In that state the United Fuel Gas Company charged two rates for gas furnished domestic consumers, that is one rate for those who had a contract and another rate for those who did not have a contract.

The rate for those who did not have written agreements was 23¢ per MCF whereas the rate for those who did have written agreements was 22¢ per MCF. The contract holders therefore were favored by a 1¢ differential which the court held was an unlawful discrimination saying:

> "The proposition that the nature of the gas business furnishes reasonable justification for the discrimination complained of, has some support, we think, in the decisions cited therefor, and particularly *Graver* v. *Edison Elect. Illum. Co., supra; Steinman* v. *Edison Elect. Illum. Co., supra*; and *Beck* v. *Indianapolis L. & P. Co., supra.* But the dissenting opinion of

Mr. Justice Gaynor in the Graver case, is a most vigorous and forceful assault upon the doctrine announced in the opinion of the New York Court. Undoubtedly the natural gas business is *sui generis*, as is also the production of electric energy for commercial purposes.

"But recent and more enlightened public judgment, the trend of modern judicial decisions, and the spirit and terms of recent legislation, including the act of our own legislature now under consideration, *are against the theory of discrimination based on any exclusiveness* of contracts." (p. 938, emphasis ours).

Until the decision in this case by the Court of Civil Appeals the difference in rate charged for gas furnished industrial consumers based upon the existence or nonexistence of written contracts was an unlawful discrimination in Texas. *Texas Power & Light Co.* v. *Doering Hotel Co.*, 147 S. W. 2d 897, affd. 162 S. W. 2d 938; and *Texas Power & Light Co.* v. *Hilltop Baking Co.*, 78 S. W. 2d 718, er. dis. The court said in its decision in the *Doering Hotel Company case, supra*:

"Decisions are legion involving rate charges made by public service corporations of consumers of electric current. It is a universal rule that a public utility cannot discriminate in its rates or charges between consumers similarly situated. Art. 1438, R. C. S., 1925, makes it unlawful for a public service corporation to do so. See, also, *El Paso Electric Co.* v. *Raynolds Holding Co.*, 128 Tex. 495, 100 S. W. 2d 97, 108 A. L. R. 744; 34 Tex. Jur., § 17; 51 C. J., §§ 16 and 61, pp. 7 and 29; 9 R. C. L., § 11, p. 1196. In view of the statute and of this universal rule, a written contract with a consumer requiring him to pay a higher rate or charge than the corporation collects from others similarly situated is of no avail to the corporation, if in fact and in law such contractual rate or charge is dis-

criminatory. *Texas Power & Light Co.* v. *Hilltop Baking Co.*, (Tex. Civ. App.) 78 S. W. 718; 20 C. J., § 30, p. 336." (147 S. W. 2d 901-902).

The Court of Civil Appeals in the present case likewise erroneously construed the decision of *United Gas Corp.* v. *Shepherd Laundries Co., Inc.*, 189 S. W. 2d 485, as requiring petitioners to show that they have suffered a loss by virtue of more favorable charges being extended to their competitors before petitioners would be entitled to an injunction. That decision simply involved the question as to proper measure of damages. The holding of the Supreme Court of Texas in that case is not contrary to our contentions. It is not contrary to the authorities upon which we rely.

*The theory of the Court of Civil Appeals is that Houston Natural Gas Corporation was entitled to raise the rate and thereby to establish a new rate, and that since the company had the legal power to do so, it could not be enjoined from enforcing the new rates. This conclusion, however, does not give any weight to the fact that Article 1438 expressly prohibits discrimination and that the power to establish new rates should be construed in such a way as to give Article 1438 the full effect that evidently was intended by the Legislature. Article 1438 can be given effect only if the power to establish new rates is construed as being limited by the express prohibition in Article 1438 against discriminatory charges. Therefore if the company proposes to continue to charge some of its customers (those who have written contracts which according to their terms have not expired) on the basis of the old rate, then charges to other customers at a higher rate would obviously be discriminatory. It is therefore clear that unless Article 1438 is to be rendered nugatory, the*

*court should hold that a new and higher rate cannot be established so long as the company continues to recognize the old rate as to contract customers.*

*In other words, the legal establishment of a rate should be in full compliance with and not in violation of Article 1438 and it therefore can be in effect only if the company in good faith puts into force the new rate as to all of its customers falling within the same proper classification. This the company has clearly failed to do in the present case and the Court of Civil Appeals therefore has clearly erred in holding that the new rate has been legally established.*

The charges above the 202 and 202-L rates assessed against petitioners were overcharges under the following quotation from the Shepherd Laundries Company decision, viz.:

> "As will be seen from the authorities hereinafter discussed, a discrimination may arise from a mere inequality in rates but an over-charge arises only when the rate charged is unreasonable in and of itself, irrespective of the rate exacted of others, *or when it is in excess of the rate established for the particular* customer or business." (189 S. W. 2d 487, emphasis ours).

The general rule as to the proper basis for rates is set out in *Ford* v. *Rio Grande Valley Gas Co.*, 174 S. W. 2d 479 (Tex.), as follows:

> "There is no rule of thumb by which to determine whether the conditions or utility service are similar or dissimilar. It is a question of fact to be determined from the testimony in each case, and the burden of proof is on the complaining party. *Elk Hotel Co.* v. *United Fuel Gas Co.*, 75 W. Va. 200, 83 S. E. 922, L. R. A. 1917E, 970. When the material billing factors

> are substantially the same the service is regarded as rendered 'under similar and like circumstances,' within the meaning of Art. 1438, *supra*. *Texas P. & L. Co.* v. *Doering Hotel Co.*, Tex. Civ. App., 147 S. W. 2d 897, *supra*. Any matter which presents a substantial difference as a ground for distinction between customers, such as quantity used, time of use, or manner of service, is a material billing factor. *American Aniline Products, Inc.*, v. *City of Lock Haven*, 288 Pa. 420, 135 Atl. 726, 50 A. L. R. 121. Quantity used is an important one. *Bilton Machine Tool Co.* v. *United Illuminating Co.*, 110 Conn. 417, 148 Atl. 337, 67 A. L. R. 814; *Kolb Cleaning and Tailoring Co.* v. *Mississippi Power and Light Co.*, 166 Miss. 136, 145 So. 910. So is cost of furnishing the service. *Graver* v. *Edison Elec. Illuminating Co.*, 126 App. Div. 371, 110 N. Y. S. 603. In fact, it has been said that quantity used and the cost of service are the principal ones. 43 Am. Jur., p. 690, Sec. 179." (p. 80).

As stated in *Rio Grande Valley Gas Co.* v. *Ford*, 169 S. W. 2d 263, affd. 174 S. W. 2d 479, the court cannot create a separate classification with reference to rates because the classification must be created either by the proper legal authority or the utility.

It has long been the rule in Texas supported by the great weight of authority that discrimination by public utilities may be prevented or restrained by suits for injunction alone. *Dallas Power & Light Co.* v. *Carrington*, 245 S. W. 1046, er. dis.; *Town of Highland Park* v. *Guthrie*, 269 S. W. 193; *City of Texarkana* v. *Wiggins*, 239 S. W. 2d 212, affd. 246 S. W. 2d 622; *Bland* v. *City of Hearne*, 95 S. W. 2d 979.

The Court of Civil Appeals' holding in this case requires us to go through the impractical, inadequate, inefficient and delaying process of proving our competitive damages before equitable relief is granted. This has never been the law. The following quotation from *Interstate Stock Yards Co.* v. *Indianapolis Railway Co.*, 99 Fed. 472, applies:

> "The nature of the wrong complained of, the fact that it is of a continuing character, that it is not susceptible of accurate pecuniary estimation, and that resort to actions at law would involve a multiplicity of suits, none of which would end the litigation, all tend to make it manifest that the remedy in a court of law is not as adequate to afford relief as is the remedy in a court of equity. The jurisdiction in equity does not depend upon the fact that there is no remedy at law. It is afforded whenever the remedy at law is not as full, adequate, and complete as in a court of equity. The rule that equitable relief will not be granted until the complainant's right or title in respect of the subject-matter has been established in an action at law, does not apply where the subject-matter of the litigation is to prevent discrimination in violation of the interstate commerce act." (p. 483).

See 17 Tex. Jur. 12; *Repka* v. *American National Insurance Co.*, 186 S. W. 2d 977 (Tex.); 43 C. J. S. 452.

In the various briefs heretofore filed in the state appellate courts we have differentiated the Texas decisions upon which respondent relies, from the prevailing and great weight of authority. We particularly refer to our supplemental brief on motion for rehearing filed in the Supreme Court of Texas.

## CONCLUSION.

Petitioners have not had a trial, jury or otherwise. Petitioners have been denied a trial by a series of arbitrary summary proceedings. One opinion has been written by an appellate court in Texas but the Supreme Court of Texas refused to approve that opinion by denying petitioners' application for a writ with the observation that the intermediate appellate court committed no reversible error which would justify setting aside the judgment.

The supplying of gas in Texas is a large industry. Will Texas have a rule different from all other state appellate courts with respect to this question and alone dissent against the holding of this court? The existence or nonexistence of a written contract as a basis for charging different rates has not been looked on with appellate court approval for more than thirty years. We pray that this petition for writ of certiorari be granted.

Respectfully submitted,

DAN MOODY,
Capital National Bank Building,
Austin, Texas,

HART, BROWN, SPARKS & ERVIN,
Brown Building,
Austin, Texas,

MONTEITH, BARING & MONTEITH,
Gibraltar Building,
Houston, Texas,

FRED W. MOORE,
1506 South Coast Life Building,
Houston 2, Texas,

*Attorneys for Petitioners.*

Copies of the above petition were delivered to counsel for respondent, Fullbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas, this day of June, 1956.

_____,

*Attorney for Petitioners.*

## APPENDIX I.

From Clerk's Office, Court of Civil Appeals,
Galveston, Texas

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Affirmed and opinion filed May 26, 1955.

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No. 12,808

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MRS. BETHEL LESLIE, A FEME SOLE, DOING BUSINESS AS LESLIE BAKING COMPANY, ET AL., APPELLANTS,

VS.

HOUSTON NATURAL GAS CORPORATION, APPELLEE.

---

Appeal from the District Court of Harris County.

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This suit was instituted in the District Court of Harris County by the appellants seeking a temporary and a permanent injunction to restrain appellee from taking any action to collect moneys due for gas furnished to appellants by appellee except such moneys as would be payable under appellee's schedule of rates designated as CI-202 and 202-L. Appellants also sought a declaratory judgment

with reference to future obligations of appellants, as industrial consumers, which might be incurred for gas furnished to them by appellee in the future, and a mandatory injunction to compel appellee to furnish gas to appellants at the above designated rates until all consumers similarly situated should cease receiving gas at such rates. By supplemental pleadings, appellants also prayed for judgment against appellee for the difference between the amounts paid by them for gas furnished, and the amounts which would have been paid had such gas been charged for at the rates provided by Schedules CI-202 and 202-L.

Appellee answered by general denial, and filed a cross-action to recover for gas furnished by it to appellants, alleging that it was entitled to be paid therefor under the terms of rate schedules designated as CI-303 and 404.

With the issues thus joined, appellee filed a motion for summary judgment, which upon hearing was granted by the trial court to the extent of denying to appellants all relief sought by them, and granting to appellee judgment against appellants on its cross-action, but expressly providing that the amount of damages recoverable by appellee upon such cross-action was to be determined on further hearing. Appellants' appeal from such order was dismissed by this Court for lack of jurisdiction. Writ of error was refused by the Supreme Court.

Upon return of the litigatioon to the trial court, the appellee urged its motion for summary judgment with respect to the recovery sought in its cross-action. This motion was granted upon hearing, and a final judgment entered disposing of all issues raised by the pleadings, The effect of such judgment is to declare the rates provided for in schedules designated CI-303 and 404 to be

the legal rate which appellee was entitled to charge appellants for gas furnished from and after the dates on which such rates were established, to deny to appellants all injunctive relief prayed for, and to grant judgment to appellee for gas furnished by it to appellants based upon the rates provided for by Schedules CI-303 and 404.

Before stating the complaints made by appellants by points of error here presented, the facts giving rise to this litigation, which are in large measure undisputed, should be stated.

Rates at which gas would be furnished to all consumers other than domestic or residential consumers were established by appellee in 1946 and set forth in schedules designated as CI-202 and 202-L. The details of the rates provided for by such schedules is not material except to say that all parties agree that prior to March 5, 1951, such rates represented the established rate for gas furnished to consumers such as appellants. On March 5, 1951, appellee withdrew Schedule CI-202 as representing the rates at which gas would thereafter be furnished to commercial and industrial consumers, and published and placed in effect a new schedule applicable to such consumers which is designated as CI-303, and which provided for rates higher than those set forth in the withdrawn Schedule CI-202. On March 5, 1951, when appellee declared the new Schedule CI-303 to be the established rate at which gas would be furnished to commercial and industrial consumers, there were outstanding unexpired contracts with certain of such consumers which provided for the furnishing of gas at the rate specified in Schedule CI-202. As to such contractual consumers, appellee continued to furnish gas at the CI-202 rate as contracted for, but as such contracts expired, tendered gas to such consumers, as well as to new customers, only at the CI-303

rates. It appears to be undisputed that at the time of the entry of the judgment appealed from, and so far as the record discloses, at the present time, there remain several industrial or commercial consumers, who by virtue of possessing unexpired contract with appellee, continue to receive gas at the rates provided for by Schedule CI-202.

In August, 1952, appellee published a new schedule as representing the established rate for gas furnished to industrial and commercial consumers. By such publication, appellee declared Schedule CI-303 to represent the rates at which gas would be furnished to any such consumer who would in writing contract for the purchase of gas for a minimum period of one year. As to such consumers who declined to enter into such contract, appellee declared a new schedule designated as CI-404 as representing the established rate for non-contract consumers. The rates published in Schedule CI-404 are higher than those published in Schedule CI-303. All litigants agree that all of the rates published in any of the schedules which have been mentioned are within the limits set by City of Houston Ordinance No. 7290 which declares the fair and reasonable rate to be charged for gas.

All of the appellants are industrial or commercial consumers of gas, who as customers of appellee, were, prior to the publication of Schedules CI-303 and 404, furnished gas at the rates established by Schedules CI-202 and 202-L, but who, at some time subsequent thereto have been tendered gas only at the rates provided for in Schedules CI-303 and 404. Certain of appellants paid the higher rates under protest, and as plaintiffs, sought judgment against appellee for the excess above the rates scheduled as CI-202 and 202-L which they have paid. Others of appellants refused to pay any amount in excess of the rates scheduled as CI-202 and 202-L. As to them, appellee, by

cross-action, sought, and was granted judgment for the difference between the amount which they had paid and the amount which would be due under the terms of Schedules CI-303 and 404. Except in so far as any judgment rendered may be executed, the interests, rights and contentions of all appellants are identical.

Appellants present seven points of error. The fundamental legal question involved however is incorporated in their points numbered one to four, inclusive, which they have grouped for the purpose of argument. Since it appears to this Court that the determination of the question there presented is determinative of this appeal, they will be considered before appellants' remaining points are stated.

By points one to four, inclusive, appellants contend that appellee, as a public utility, is obligated to furnish gas to appellants at the lowest established rates for industrial consumers in Harris County, which, they contend, under the facts stated, is represented by Schedules CI-202 and 202-L, and that the existence or non-existence of written contracts is immaterial; and that a difference in rate base upon the existence or non-existence of a written contract constitutes unlawful discrimination in violation of Article 1438, V. A. T. S. It is further their contention that the undisputed facts establish unlawful discrimination entitling all of appellants to the injunctive relief prayed for, and those of appellants who have paid in excess of the rates established by Schedules CI-202 and 202-L to judgment against appellee for such excess.

In their brief, both litigants have cited and analyzed numerous authorities from this and other jurisdictions. We feel safe in assuming that this Court has had the benefit of having its attention directed to every decided case

which could be of assistance in the determination of the question presented. The labor which would otherwise be involved in reaching the proper determination of the conflicting contentions which are so ably presented appears to this Court, however, to have been heretofore in every material respect performed by the Supreme Court of Texas in its decision of the case of United Gas Corporation v. Shepherd Laundries Company, Inc., 189 S. W. 2d 485. We feel that the legal principles which that decision so authoritatively establish, when considered in the light of the undisputed facts presented by this present record, beyond any doubt, compels this Court to overrule appellants' points one to four, inclusive. To such an extent is this true, that we consider a statement of the facts there involved, together with the legal principles stated by the court, to be in order here.

That suit, United Gas Corporation v. Shepherd Laundries Co., supra, was instituted in Harris County by Shepherd Laundries Co. for damages because United Gas Co. charged it a higher rate for gas furnished than it did other customers under similar and like circumstances. The suit was for the difference between the rate paid by the plaintiff and the lower rate paid by other similar customers. Based upon jury findings that the favored customers were served under similar and like circumstances, and upon the undisputed facts that they received gas at lower rates, judgment was rendered for plaintiff in the sum of $5,094.10, which was affirmed by this Court. 181 S. W. 2d 929. The Supreme Court of Texas reversed both courts. The opinion was written by Folley, Commissioner, and adopted by the Supreme Court. In it Judge Folley reviews at length the development of the law applicable to the fact situation there presented, citing numerous authorities. The following legal propositions, which we

consider to be likewise applicable to the present case, are clearly established by that opinion. The authorities there cited are here omitted both for brevity, and because we consider that opinion in itself to constitute ample authority for the guidance of this Court.

At common law a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry for all, upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable, nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis.

The courts in the United States developed an exception to the English common law rule. This exception required equality in rates between competitors in business. This exception is based upon the logical conclusion that if two customers are competitors, a favoring of one with a lower rate necessarily injures and damages the other.

Article 1438 is as follows: "It shall be unlawful for any such corporation to discriminate against any person, corporation, firm, association or place, in the charge for such gas, electric current or power, or in the service rendered under similar and like circumstances."

There is nothing in this article providing a penalty or fixing a measure of damages for discrimination. It merely declares discrimination to be unlawful and leaves the injured party to the same remedy for damages as existed under the common law. Thus, before one may recover for mere discrimination, he must allege and prove his loss as in tort.

A discrimination may arise from a mere inequality in rates, but an overcharge arises only when the rate charged is unreasonable in and of itself, irrespective of the rate exacted of others, or when it is in excess of the rate established for the particular customer or business.

The applicability of the foregoing principles to the present litigation are apparent when the following facts are considered. Appellants make no charge in any pleading that either the CI-303 or 404 rates are unreasonable or excessive. On the contrary, the undisputed evidence elicited by deposition of appellants' witnesses affirmatively establishes that no such charge is made. Neither is there any contention made or proof offered that appellants are in competition with any of the consumers to whom the CI-202 or 202-L rate is extended. On the other hand, such proof as does appear establishes that they are not competitors. The basis of appellants' complaint is disclosed by the following statement taken from their brief: "We did not attack the 303 or 404 rates as being unreasonable in and of themselves, although it is elementary that any rate which is discriminatory is unreasonable." We do not consider it to be the function of this Court to apply as elementary any proposition, the contrary of which has been categorically declared to be the law of this State by the Supreme Court.

Appellants, while recognizing the force and effect of the decision in United Gas Corporation v. Shepherd Laundries Co., supra, seek to distinguish and escape the force and effect of that holding upon the theory that the Supreme Court was not in that case confronted with a difference in rates based upon the existence or non-existence of a written contract for gas service. The factual basis for their contention is the admitted continuation of service by appellee at the CI-202 or 202-L rates to those con-

sumers who hold unexpired contracts for service under such schedules. If we correctly understand appellants' argument, it is premised upon the proposition that such continuation of service constitutes the CI-202 and 202-L rates as the established rates, and as a consequence constitutes any higher rate, such as the CI-303 or 404 rates, an overcharge, per se. This state of facts, appellants contend, entitles them to the relief which they seek under the rationale of the decision of the case of Texas Power & Light Co. v. Hilltop Baking Co., 78 S. W. 2d 718.

Appellee on the other hand contends that under any possible view, the CI-303 rate became the established rate in March of 1951, and remained such until August, 1952, at which time the CI-303 and 404 rates together became the established rates. The factual basis for their contention rests upon the undisputed proof that every step taken in fixing of the earlier CI-202 rate was taken by appellee in fixing the CI-303 rate as its applicable rate schedule applicable to appellants' businesses; that after its publication, the new rate schedule was the only schedule currently offered by appellee as the basis for contracting with any of its industrial or commercial customers; that the new schedule was filed with all administrative bodies having jurisdiction over appellee and its customers; and that the custom and practice of appellee in applying the new schedule to its customers as soon as their contracts expired was uniform.

We confess that the problem presented is difficult of solution. Neither litigant has cited, nor have we been able to find, any Texas authority dealing directly with the question of what facts determine and identify the "established rate". Most of the authorities to which we have been referred deal with the question of whether or not a utility may or may not charge one rate to customers who

contract for service in writing, and another rate to customers who do not so contract. Appellee cites Bantuelle v. Southwestern Gas & Electric Co., 143 S. W. 2d 994; Globe Ice Co. v. City of El Paso, 92 P. U. R. (New Series) 524; and Cock v. Marshall Gas Co., 226 S. W. 464, which convince us that in this jurisdiction, a utility may lawfully so differentiate. Appellants rely principally upon the case of United Fuel Gas Co. v. Public Service Commission, 80 S. E. 931, decided by the Supreme Court of West Virginia, which appears to hold squarely that in that jurisdiction such differentiation is unlawful. Aside from the fact that that decision is from another state, and therefore only persuasive, we note that in that case the court was construing a statute of West Virginia, which, while not quoted in full in the opinion, appears from the context thereof to confer upon the Public Service Commission of that state the authority to abolish any rate charged by a utility which was discriminatory as defined by such statute. No such statute is involved here. The only applicable statute is Article 1438, V. A. T. S., which our Supreme Court has held merely declares discrimination unlawful, and leaves the injured party to the same remedy for damages as existed under the common law, namely, to allege and prove his loss in tort. In again referring to the United Gas Corp. v. Shepherd Laundries Co. (Supra) decision, we think it important to note that the Supreme Court therein held that Article 1438 does not make the lowest rate the legal rate. We further think it important to note the recognition by that court of the fact that while empowered to do so under the provisions of Art. 6053, et seq., V. A. T. S., neither the City of Houston nor the Railroad Commission of Texas has undertaken to fix any rates for the sale of gas to industrial consumers, and that the power of establishing rates rests in the utility itself under the provisions of Article 1435, V. A. T. S. The possession by appellee of

the legal power of establishing the rate at which it will sell gas, coupled with the mentioned holding that the Article 1438 does not make the lowest rate charged the legal rate, appears to us to undermine appellants' argument that appellee could not establish a higher rate so long as there existed unexpired contracts at a lower rate. But of more compelling significance is the fact that in the Shepherd Laundries Co. case, Shepherd Laundries was paying a 19-18-17 cent rate which was "applicable to any customer contracting to use gas for industrial or other purposes for which no specific schedule was provided." During part of the time the plaintiff was paying this 19-18-17 cent rate, other customers were furnished gas at a 14-13-12 cent rate for like amounts, either under written contracts calling for service at such lower rates, or were refunded all sums paid over such 14-13-12 cent rate. During part of the same time other customers were furnished gas at a 16-15 cent rate under written contract. The jury found that the "favored customers were served under similar and like circumstances" as those for the plaintiff. The Supreme Court held, however, that during the period of time in dispute the 19-18-17 cent rate was the rate established by the utility as being available to the plaintiff. The court held that if the plaintiff paid only this fixed rate and others paid less than the fixed rate, then only discrimination was shown and not overcharge. From this holding, the conclusion appears inescapable that the existence of contracts for the furnishing of service at one rate does not prohibit a utility from establishing a new and different rate. The "established rate" appears to be that at which the utility declares that it will at any stated time furnish gas to consumers under similar and like circumstances. For that reason we hold that the rates provided in Schedules CI-202 and 202-L ceased to be, and those provided in Schedule CI-303 became the

established rate when appellee declared schedule CI-303 to be the rate at which it would furnish gas to its consumers under similar and like circumstances. The continuation of service to customers who held unexpired contracts for service under the CI-202 and 202-L rates amounted to deviations from the established rate, and constituted discrimination but not, under the record, overcharges to appellants.

If we are correct in the foregoing conclusions, this case is clearly distinguishable from Texas Power & Light Co. v. Hill-Top Baking Co., supra, upon the same basis upon which the Supreme Court distinguished that case from the Shepherd Laundries Co. case. Appellants also cite the case of Texas Power & Light Co. v. Doering Hotel Co., 162 S. W. 2d 938 (Tex. Sup. Ct.). That holding, in so far as it is applicable to the present case, appears to us to have been expressly overruled by the Shepherd Laundries Co. decision.

The only other basis on which appellants seek to distinguish this case from and escape the effect of the holding in United Gas Co. v. Shepherd Laundries Co., supra, rests in the fact that in addition to damages for alleged overcharge, appellants also sought injunctive relief against future collection of the alleged overcharge, whereas the cited case involved only the damage element. We do not consider the authorities which appellants cite to be applicable. Having held that appellee had the legal right to establish the CI-303 rate schedule, we are unable to see how it may be enjoined from collecting such rates.

The primary legal philosophy upon which the Supreme Court denied recovery in the Shepherd Laundries Co. case, as well as in Kousal v. Texas Power & Light Co., 179 S. W. 2d 283, rests upon the proposition that the allowance

of the recovery sought "would create a legalized but endless chain of departures" from the established rate. The granting of the injunctive relief here sought would obviously have the same effect.

By point five, appellants complain of the asserted error of the trial court in granting the summary judgments favorable to appellee because of the existence of various disputed issues of fact. From their argument under such point, it is clear that appellants do not contend that any dispute exists relative to those facts which have been stated heretofore and upon which we base our conclusions relative to points one to four, inclusive. The dispute referred to is premised upon appellants' allegations of an illegal combination between appellant and another gas utility company operating in the City of Houston, and their allegation of the existence of an unlawful monopoly, violative of the provisions of Article 7426, V. A. T. S. These allegations are contained in pleadings designated as Plaintiffs' First Amended Original Petition, which pleading was, upon appellee's motion, stricken by the trial court. This action by the trial court is the basis of appellants' point six. We are of the opinion that both points must be overruled. No remedy existed at common law for private persons injured as the result of a combination or monopoly. While Title 126, V. A. T. S., expressly vests a cause of action for such illegal acts only in the State, it has been held that damages may be recovered by an individual plaintiff or plaintiffs upon a showing that injury results from a violation of the provisions of such statutes. North Texas Gin Co. v. Thomas, 277 S. W. 438 (writ refused). We have already pointed out that appellants at no time alleged that the rates scheduled as CI-303 or 404 are unreasonable rates; or that those consumers favored by the extension of the lower CI-202 or 202-L rates are com-

petitors of appellants. By pleading, by depositions, and by admissions of fact, appellants have limited their cause of action to one based upon discrimination, which they contend amounts to an overcharge. We have concluded that Schedules CI-303 and 404 reflect the established rates applicable to appellants. Therefore, having failed to allege injury in tort, and the undisputed facts proving the absence of such injury or damages, the existence of the facts to which appellants' fifth and sixth points are directed, even if disputed, are immaterial in the determination of their rights. Furthermore, it appears that the judgment denying appellants any relief, and granting recovery to appellee upon its cross-action, was entered by the trial court on November 23, 1953. By it were determined all issues raised by the pleadings of the litigants then before the court, excepting only the amount of the judgment in favor of appellee upon its cross-action. That amount appears to have been later determined upon undisputed facts, and is not complained of by appellants. The judgment of November 23, 1953, was entered after a hearing held in compliance with the provisions of Rule 166-A, T. R. C. P., for which the appellants announced ready. The pleadings designated Plaintiffs' First Amended Original Petition appears to have been filed on May 26, 1954. Therefore, even had the matter therein alleged been material, it was filed too late under the provisions of Rule 166-A, T. R. C. P., and appellee's motion to strike was properly sustained by the trial court. Rountree v. Bridwell, 269 S. W. 2d 824.

By their point seven appellants complain that the judgment in favor of appellee upon its cross-action includes the allocation of a proportionate part of a state occupation or gathering tax which tax has since been declared unconstitutional by the Supreme Court of the United States in Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157.

They contend that the amount of the judgment represented by such illegal tax should be stricken. Appellee answers that it is in the process of refunding voluntarily the amount represented by such tax which it has heretofore collected. These matters are entirely outside of the appellate record here presented. Aside from such original writs as may be invoked to protect its jurisdiction, this Court's jurisdiction is exclusively appellate. The matters presented by appellants' point seven are, therefore, not within our jurisdiction, and we cannot and do not undertake to pass upon such point.

Judgment affirmed.

/s/ W. P. Hamblen, Jr.
Chief Justice.

Judgment rendered and opinion filed May 26, 1955.

THE STATE OF TEXAS }
COUNTY OF GALVESTON }

I, ROLA HAMM, Clerk Pro Tem of the Court of Civil Appeals, First Supreme Judicial District of Texas, at Galveston, do hereby certify that the preceding 13 pages contain a true and correct copy of said Court's opinion, filed May 26, 1955, in cause No. 12808, MRS. BETHEL LESLIE, A FEME SOLE, DOING BUSINESS AS LESLIE BAKING COMPANY, ET AL, APPELLANTS, vs. HOUSTON NATURAL GAS CORPORATION, APPELLEE, from Harris County, and now on file in my office.

TO CERTIFY WHICH, I hereunto set my hand and affix the Seal of Said Court, at Galveston, this the 22nd day of May A. D. 1956.

(Seal) Rola Hamm, Clerk Pro Tem

By ..... Deputy

## APPENDIX II.

A 5420

Returned 5/9/56
Recd 5/10/56

**No. 5420**

IN THE SUPREME COURT OF TEXAS

MRS. BETHEL LESLIE, ET AL.,
Petitioners

VS

HOUSTON NATURAL GAS CORPORATION,
Respondent

**Petitioner's Second Motion for Rehearing.**

Received in Supreme Court of Texas Mar 23 1956

Geo. H. Templin, Clerk ..... Deputy

TO THE SUPREME COURT OF TEXAS:

In our original motion for rehearing, we stressed the fact that there was another suit pending in Harris County involving the same or similar questions, and we urged this court to write an opinion in this case so as to authoritatively decide the various legal questions involved which, in our opinion, were erroneously decided by the Court of Civil Appeals. Our original motion was denied March 14, 1956. This court did not approve the decision of the Court of Civil Appeals on the legal questions because our application was refused, "no reversible error."

Nevertheless, trial courts have a very strong tendency to regard the opinion of the Court of Civil Appeals as

controlling in similar cases involving similar questions of law and fact. As stated, we have almost an identical situation existing in our suit against United Gas Corporation.

The principal question involved in this litigation is whether or not industrial consumers in Harris County are being charged the lowest established rate. We insist that the contract rate granted consumers that have written contracts for the utility is the lowest established rate, that is, the 202 and 202-L rates.

The utility insists that its new rates, that is, the 303 or 404 rates are the established rates, and that the contract rates are a mere undercharge, to a few customers.

On February 27, 1956, the U. S. Supreme Court rendered a decision styled United Gas Pipe Line Company, Petitioner, vs Mobile Gas Service Corporation, 76 S. Ct. 373, which appears in the March 1, 1956, advance sheet of the Supreme Court Reporter.

We were not certain that this court had this particular set of Supreme Court Reports, and consequently we obtained from the Clerk of the Supreme Court at Washington nine (9) copies of the opinion in that case, and we ask that same be filed and considered in connection with this motion and application.

Mr. Justice Harlan delivered that opinion which involved the question as to whether the Natural Gas Company furnishing gas to a distributing company under a long-term contract may, without the consent of the distributing company, change the rate specified in the contract simply by filing a new rate schedule with the Federal Power Commission.

The U. S. Supreme Court held that the mere filing of the rate schedule with the Federal Power Commission was

not sufficient to change the rate. In other words, the United Gas Pipe Line Company, because it did not get the approval of the Commission, authorizing the change, was, in effect, making the change itself. The court said in part:

> "In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act."

Consequently the United Gas Pipe Line Company in that case is in exactly the same situation with reference to changing its rates as is the Houston Natural Gas Corporation in the present case.

The U. S. Supreme Court held that the company could not unilaterally change its contract and that consequently the contract rate was the lowest established rate *and the only lawful rate* and directed the United Gas Corporation to restore or repay unto the Mobile Gas Service Corporation any rates charged in excess to the rates specified in the contract.

In so holding, the U. S. Supreme Court ruled as follows:

> *"From our conclusion that the Natural Gas Act gives a natural gas company no power to change its contracts unilaterally, it follows that the new schedule filed by United was a nullity insofar as it purported to change the rate set by its contract with Mobile and that the contract rate remained the only lawful rate.'*

This decision supports squarely our contentions that the lowest established rate which was the only lawful rate is the contract rate.

Since rates 202 and 202-L are the lowest established rates they apply to all industrial consumers of Harris County. It is the only lawful rate which they should be obligated to pay irrespective of whether they have contracts or not, if they are all members of the same class; and the same billing factors apply, as they do here.

We repeat, that the contract rate in this case, that is, rates effected by Schedules 202 and 202-L are the only lawful rates as held by the U. S. Supreme Court in the decision just mentioned.

The Houston Natural Gas Corporation did not obtain any authorization from the City Council of Houston, or the State Railroad Commission, authorizing the change in rates.

As a consequence, all charges made Petitioners in this case by the Houston Natural Gas Corporation above the contract rates reflected in Schedules 202 and 202-L are overcharges in line with the statement made by the Court of Civil Appeals (and this court in United Gas Corp. v. Shepherd Laundries Co., 189 S. W. 2d 485) to the effect that an overcharge arises, "*when it is in excess of the rate established for the particular customer or business.*"

The contract rate remains the only lawful rate, as held by the U. S. Supreme Court in the decision mentioned above, and we are entitled to recover any and all moneys paid by the Petitioners, or any of them, to the Houston Natural Gas Corporation in excess of the contract rate, which was the *only lawful rate.*

FIRST POINT

The 303 and 404 rates attempted to be charged industrial consumers in Harris County by the Houston Natural Gas Corporation, are in excess of the only lawful rates, which are the contract rates reflected in Schedule 202 and 202-L, and the exaction of said higher rates by the Houston Natural Gas Corporation is in violation of the Fourteenth Amendment to the U. S. Constitution, in that the utility is exacting moneys from petitioners without due process of law, and is denying them the equal protection of the laws, all contrary to the said Fourteenth Amendment. Said rates 303 and 404 are unreasonable as a matter of law and are therefore confiscatory as a matter of law, in violation of the U. S. Constitution.

CONCLUSION

Not only is the decision of the Court of Civil Appeals contrary to the decisions of the highest courts of all states other than Texas that have considered this question, but it is obvious that said decision is contrary to this recent decision of the U. S. Supreme Court.

WHEREFORE Petitioners pray that this court allow Petitioners to file this second motion for rehearing and upon hearing thereof that this court grant plaintiff's Application for Writ of Error and reverse and render this cause, or reverse and remand same for further proceedings of the trial court; and Petitioners likewise pray they be granted such other and further relief to which they may be entitled by virtue of the premises.

Copies of the above Motion for Rehearing were delivered to Fulbright, Crooker, Freeman, Bates & Jaworski,

South Coast Life Building, Houston 2, Texas, Attorneys for Respondent, on March 22, 1956.

Respectfully submitted,

Dan Moody,
Capital National Bank Building
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Hart, Brown, Sparks & Erwin
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Austin, Texas
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Fred W. Moore
1506 South Coast Life Building
Houston 2, Texas
Attorneys for Petitioners

## APPENDIX III.

### HOUSTON NATURAL GAS CORPORATION

SCHEDULE OF RATES

JULY, 1946

Rates C-I-202L and 202 (See note below)

This rate is applicable to bakeries, cleaning and pressing shops, laundries, hospitals, office buildings, creameries, stores, and for all other commercial and industrial establishments operating throughout the year not covered by special contract, and for gas furnished for all other commercial or industrial purposes, except commercial cooking, which is covered by a different rate.

Discount Date: Ten days after date of billing.

The Maximum amount payable in each of the brackets below shall be no greater than the minimum amount which would be payable in the next succeeding bracket.

| | | Gross Rate Per MCF | Net Rate Per MCF | Maximum Net Bill |
|---|---|---|---|---|
| 1. When total monthly deliveries are between O and Plus 50¢ per meter monthly service charge Minimum Monthly Bill: $.50 | 40 MCF | $.725 | $.65 | $ 20.00 |
| 2. When total monthly deliveries exceed | 40 MCF | .5555 | .50 | 29.90 |
| 3. When total monthly deliveries exceed | 115 MCF | .2888 | .26 | 49.98 |
| 4. When total monthly deliveries exceed | 238 MCF | .2333 | .21 | 142.50 |
| 5. When total monthly deliveries exceed | 792 MCF | .2000 | .18 | 200.00 |
| 6. When total monthly deliveries exceed | 2000 MCF | .1111 | .10 | 270.00 |
| 7. When total monthly deliveries exceed | 3000 MCF | .1000 | .09 | 425.00 |
| 8. When total monthly deliveries exceed | 5000 MCF | .0944 | .085 | 800.00 |
| 9. When total monthly deliveries exceed | 10000 MCF | .0888 | .08 | See Note* |
| 10. When total monthly deliveries exceed | 75000 MCF | .0833 | .075 | |

*The Maximum Net Bill depends upon the British Thermal Unit applicable to the $ .75 bracket.

Payments for natural gas when total monthly deliveries hereunder exceed 75,000 MCF per month shall be decreased or increased, as the case may be, at the rate of 1% for each 10 British Thermal Units below or above 1,000 British Thermal Units average total calorific value per cubic foot natural gas.

When the total deliveries hereunder exceed 1200 MCF in any Month Consumer shall reimburse Company for the

applicable 2% gross receipts tax paid to the City of Houston and the applicable 1.5125% occupation tax paid to the State of Texas, plus any new or additional or increased production, transportation, sales, excise, severance or distribution tax or other charges (other than ad valorem taxes or taxes measured by income) assessed, imposed, levied or fixed against the Company by any governmental authority as the result of any new or amended law or ordinance enacted on or after January 1, 1947, or which is added to or made a part of the cost of natural gas purchased or to be purchased by Company for delivery to Consumer during the term of this agreement. Such taxes shall be computed by Company and included as a separate item on Consumer's gas bills.

Note: Schedule C-I-202 is the same schedule as is above set forth except that Schedule C-I-202 only includes the rates set forth above up to and including item 6, that is items 1 to 6, inclusive.

## APPENDIX IV.

### RATE SCHEDULE C-I-303

HOUSTON NATURAL GAS CORPORATION

In this rate schedule, Houston Natural Gas Corporation is called "seller" and the customer who signs a contract for gas purchased under this schedule is called "consumer" and the term "MCF" means "1,000 cubic feet of gas."

This rate schedule may be applied at any consumer's establishment

A. which is supplied by seller's existing pipe lines of adequate capacity operating at suitable pressures

and/or by pipe lines which seller is willing to construct, and

B. is in an area to which this rate schedule applies as determined by seller. (A list of the applicable areas is on file in the office of seller in Houston, Texas)

This rate schedule is not available for the purchase of gas for the operation of household appliances in the living quarters of single or multiple housing establishments, and gas purchased under this rate schedule shall not be shared with, or sold to, others. Subject to all of its terms and conditions, this rate schedule is available for all other purposes to any consumer, provided that consumer executes a written contract executed also by seller for a term of not less than one year; except that after August 31, 1955, a contract may be for the period up to and including a billing month ending in August, 1956.

Other rate schedules are available to consumer at his option on application to seller.

Bills figured at the net rate are payable within 10 days after the date of the bill, after which 10 days bills figured at the gross rate apply.

The maximum amount payable in each of the brackets Nos. 1 to 7 inclusive, shall be no greater than the minimum amount which would be payable in the next succeeding higher numbered bracket.

| Bracket No. | Total Monthly Deliveries of Gas to Consumer | For Total Gas Delivered Monthly: Gross Rate Per MCF | Net Rate Per MCF |
|---|---|---|---|
| 1 | up to but not including 120 MCF | $ .714 | $ .70 |
| 2 | 120 MCF and up to but not including 200 MCF | .357 | .35 |
| 3 | 200 MCF and up to but not including 300 MCF | .306 | .30 |

| | | | | |
|---|---|---|---|---|
| 4 | 300 MCF and up to but not including | 800 MCF | .255 | .25 |
| 5 | 800 MCF and up to but not including | 1,500 MCF | .204 | .20 |
| 6 | 1,500 MCF and up to but not including | 2,000 MCF | .1632 | .16 |
| 7 | 2,000 MCF and up to but not including | 5,000 MCF | .1428 | .14 |
| 8 | 5,000 MCF and up to but not including | 42,000 MCF | .1326 | .13 |

Special contracts are available for consumers using more than 42,000 MCF monthly.

| | Gross | Net |
|---|---|---|
| Minimum Monthly Bill | $4.28 | $4.20 |

Note carefully the following: The sale prices in the rate schedule set forth above are applicable through the billing months ending in August, 1951. For billing months beginning in August, 1951, through billing months ending in August, 1952, the sale price for each bracket in the above rate schedule shall be increased by 1-1/2¢ per MCF in the net rate and by 1.53¢ per MCF in the gross rate. For billing months beginning in August, 1952, through billing months ending in August, 1956, the sales prices in the above rate schedule (applicable through the billing months ending in August, 1951) shall be increased by 2¢ per MCF in the net rate and 2.04¢ per MCF in the gross rate in each bracket of the rate schedule.

The above rates are subject to all provisions set forth in the contract between seller and consumer to which this rate schedule will be attached.

## APPENDIX V.

HOUSTON NATURAL GAS CORPORATION
HOUSTON, TEXAS

STANDARD RATE C-I-404

This rate is not applicable to temporary or seasonal service such as, but not limited to, that required for saw mills, irrigation, and well-drilling.

Effective with billing periods beginning on and after August 1, 1952, the following Gas Rate Schedule will apply to all Commercial and Industrial Consumers in the Houston Area except those serviced under written contracts for a minimum period of one year.

MCF means "thousand cubic feet"
CCF means "hundred cubic feet"

| Quantity Per Month | | Net Rate |
|---|---|---|
| First | 0.4 MCF | $1.20 |
| Next | 8.6 MCF | .60 per MCF |
| Next | 11.0 MCF | .55 per MCF |
| Next | 10.0 MCF | .45 per MCF |
| Next | 170.0 MCF | .40 per MCF |
| Next | 200.0 MCF | .35 per MCF |
| Next | 400.0 MCF | .30 per MCF |
| Next | 400.0 MCF | .25 per MCF |
| Next | 1200.0 MCF (delivery at Seller's option) | .21 per MCF |

Minimum Monthly bill $1.20

To arrive at the gross rate for monthly consumptions up to and including 200 MCF, the above net rates shall be increased by 1.0¢ per CCF.

To arrive at the gross rate for monthly consumptions greater than 200 MCF, the above net rates shall be increased by 1.0¢ per CCF up to and including 200 MCF and by 2% above 200 MCF.

The difference between the gross and net rates, representing a discount, shall be allowed for payment of bills within ten days after the date of the bill.

If a gas bill is not paid within ten days after its date, the gross rate shall apply.

This rate shall be known as

"Standard Rate C-I-404"

Gas service hereunder shall be subject to the Company's Rules and Regulations for the sale of gas.

Houston Natural Gas Corporation

July 10, 1952

FILED
JUL 5 1956
JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM — 1956

No. 146

MRS. BETHEL LESLIE, ET AL.,
*Petitioners,*

v.

HOUSTON NATURAL GAS CORPORATION,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF TEXAS

## BRIEF FOR RESPONDENT IN OPPOSITION

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In The

# Supreme Court of the United States

October Term — 1956

No. 146

Mrs. Bethel Leslie, et al.,

*Petitioners,*

v.

Houston Natural Gas Corporation,

*Respondent.*

On Petition for a Writ of Certiorari to
The Supreme Court of Texas

## BRIEF FOR RESPONDENT IN OPPOSITION*

*May It Please The Court:*

Respondent, Houston Natural Gas Corporation, submits its brief in opposition to the petition for a writ of certiorari to review the judgment of the Supreme Court of Texas denying petitioners' application for a writ of error.

### Objections To The Jurisdiction Of The Court

Petitioners label an entire section of their brief "federal questions raised in trial court and appellate courts". However, contrary to Rule 23 of the Supreme Court Rules, no specific references were made in their brief to the places in the record where the "federal questions" sought to be reviewed were raised or passed on. This failure upon the part of petitioners to point out by the record where and how a federal question was raised was not mere oversight.

* Emphasis supplied unless otherwise indicated.

Compliance with the rule is impossible. The record in this case affirmatively shows that no federal question was timely and properly raised so as to give this Court jurisdiction. The so-called "federal questions" asserted by petitioners were never raised, briefed or presented to the Court below whose decision is to be reviewed. Nor are such asserted questions substantial. To demonstrate these points, it is necessary for respondent to refer to the record and to make the following brief statement of facts which respondent deems relevant and which were either ignored or inadequately stated in the petition.

**Statement**

The suit was filed by petitioners to prevent, by injunction, an alleged discrimination against them in the application of respondent's industrial and commercial gas rates in the City of Houston, Texas. Petitioners sought to require respondent to apply to their service its 202 rate schedule not on the ground that the higher rates 303 and 404 charged them by respondent were unreasonable or excessive, but on the ground that the lower 202 rate was being applied to a few other customers in Houston under long-term written contracts. These few customers were alleged to be similarly situated to petitioners.

Gas rates in Texas cities and towns are regulated by the cities, in the first instance, and then, on appeal from city regulation, by the Texas Railroad Commission. Articles 1175 and 6050, et seq., Texas Revised Civil Statutes. The City of Houston had fixed *maximum* rates for gas distribution companies serving within its limits. *It is conceded that the rates charged petitioners in this case did not exceed such maximum rates.* (Cf. Brief of Petitioners (Plaintiffs) on appeal to the Texas Court of Civil Appeals p. 9). No complaint as to the rates charged them was ever made by petitioners to the City of Houston or to the Texas

Railroad Commission. (See: Defendant's Plea in Abatement, Tr. p. 29); (Order Overruling Plea in Abatement, Tr. p. 35).

For more than ten years the Texas law has been settled by decision of its highest court that there can be no recovery for an alleged discrimination in gas rates unless the person discriminated against can show injury to his business, competitive losses and some *actual* damages. *United Gas Corporation* v. *Shepherd Laundries Co., Inc.,* (Tex. Sup. Ct., 1945) 189 S.W. 2d 485. No competitive losses were alleged or shown by petitioners. In fact, the customers alleged to have been preferred by respondent were not even competitors of petitioners (Tr. p. 104).

**For all practical purposes this controversy is moot. The only remedy petitioners seek is an injunction requiring respondent to serve them at the 202 rate so long as any of the contract customers are served at that rate. All of the contracts complained of have expired and all other customers, some 300, are now paying the rates charged petitioners, with the lone exception of Asbestos Company of Texas. This customer's contract expires in a few months (January 1, 1957). (Deposition of petitioners' agent, R. F. Hibbetts, pages 62-67). In all probability, before this Honorable Court could decide this case, the one remaining contract will have expired, thus rendering this controversy moot.**

That only State grounds for decision existed and that no Federal questions were presented or decided below is clearly shown by the following quotations from the record:

1. Plaintiffs' original petition, page 11 (Tr. pp. 2-18): " . . . that by virtue of the premises, *defendant has violated Articles 1438, 1505 and 6057 of the Revised Civil Statutes of Texas* which particularly state that it shall be unlawful for any public utility to discriminate against anyone in its charges for gas furnished . . . ".

2. Plaintiffs' original petition, page 13 (Tr. pp. 2-18): "The contract lacks mutuality and is a grossly unfair and unjust contract which a public utility has no right to require of the citizens of Texas; that *such contracts are in violation of the statutes hereinbefore mentioned . . .*".

3. Plaintiffs' second supplemental petition, filed February 8, 1954, page 9 (Tr. Vol. II, pp. 1-11): " . . . Both the principal retail gas companies follow the same policies and attempt to charge the same rates, which is an unlawful combination *in violation of the Texas Statutes prohibiting trusts and monopolies.*"

4. The opinion of the Galveston Court of Civil Appeals (Brief of Petitioners' Appendix page 13) states the so-called monopoly issue raised (belatedly) by petitioners as strictly a *State* issue: "The dispute referred to is premised upon appellants' allegations of an illegal combination between appellee and another gas utility company cooperating in the City of Houston, and their allegation of the existence of an unlawful monopoly, *violative of the provisions of Article 7426 V.A.T.S.*"

5. The only mention of the Constitution of the United States of America in the trial court was in connection with the claim that the device of summary judgments allowed a piecemeal trial and denied petitioners the right of trial by jury. This claim or contention was first made in the trial court in a pleading not filed until *after* that court had denied petitioners' own motion for summary judgment and had granted a summary judgment denying plaintiffs any relief (Tr. p. 294, Judgment). (Tr. Vol. II, p. 1, Second Supplemental Petition.) *The point was not briefed or presented on appeal.* (See: Brief for Appellants (Petitioners) in the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston), pages 52-58. *The assignments of error on application for a writ of error to the*

*Texas Supreme Court did not contain this point.* (See: Brief for Petitioners on Application for Writ of Error).

6. The second motion for rehearing filed by petitioners in the Texas Supreme Court (See: Appendix A20 — Brief for Petitioners) — this being the only place where petitioners even assert that they "particularly plead a violation of the 14th Amendment" — is one not provided for by the Texas Rules of Civil Procedure. See Texas Rules Civil Procedure, Rules 515-517. This second motion was not allowed to be filed and was not considered by the Texas Supreme Court.

7. The recitals contained in Petitioners' unauthorized Second Motion for Rehearing were as follows:

> "... The utility is exacting moneys from petitioners without due process of law, and is denying them the equal protection of the laws, all contrary to the said Fourteenth Amendment. Said rates 303 and 404 are unreasonable as a matter of law and are therefore confiscatory as a matter of law, in violation of the U. S. Constitution ..."

Such recitals not only contradict the undisputed record in this case but are in direct contravention of the admission made by Petitioners' agent and rate consultant, R. F. Hibbetts, who testified by deposition as follows:

(Depos. Hibbetts, p. 43):

> "Q. Are you in your complaint against the Houston Natural Gas Corporation, acting as agent and representative of all of these plaintiffs, making any charge that rate 303 is unreasonable?
> A. I don't think that charge has been made any place in the petition.
> Q. Are you making any such charge as to rate 404?
> A. I don't think that has been made any place in the petition."

The record is correctly quoted by the Court of Civil Appeals in these words (Appendix to Petitioners' Brief, p. 13):

> 'We have already pointed out that appellants at no time alleged that the rates scheduled as CI-303 or 404 are unreasonable rates . . ."

## Argument

### I

### No Federal Question Was Raised In The Texas Supreme Court

It is elementary that this Court has jurisdiction over state cases only where a substantial federal question has been properly framed, raised and considered in the state courts. *Oxley Stave Co.* v. *Butler County,* 166 U.S. 648.

The mere assertion of a "federal right" in the trial court will not suffice. Petitioners must follow the state procedures in raising the federal question. They must present such question to the trial court at the point considered appropriate under the state procedure. They must preserve the question on appeal. *Hulbert* v. *Chicago,* 202 U.S. 275; *Brown* v. *Massachusetts,* 144 U.S. 573. Thus, in *Hulbert* v. *Chicago, supra,* at page 281, the Court held:

> "Nor was a right under the constitution of the United States necessarily involved in the determination of the cause. And the Supreme Court was justified by its rulings in omitting the consideration of right under the Constitution of the United States. *According to the practice of the court, an error not assigned is not open to review. Barry* v. *Chicago,* 192 Ill. 154, 155, 61 N.E. 498. *Errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned. Keyes* v. *Kimmel,* 186 Ill. 109, 114, 57 N.E. 851. *And such rule of practice will be recognized by this court.* Erie Railroad Company v. Purdy, 185 U.S. 148, 153, 46 L. Ed. 847, 850, 22 Sup. Ct. Rep. 605."

The Texas law is exactly the same as the Illinois law relied upon by the Supreme Court in *Hulbert* case, *supra*. It is the settled law of Texas that the appellate courts may consider only points assigned as error. All other alleged grounds for relief are considered waived or abandoned and may not be passed upon by either the Court of Civil Appeals or the Texas Supreme Court. Texas Rules of Civil Procedure, Rules 374; (Assignments of Error) 469(c) (Requisites of Application for Writ of Error); *Elliff* v. *Texon Drilling Co.*, 146 Tex. 575, 210 S.W. 2d 558; *Edwards* v. *Strong*, 147 Tex. 155, 212 S.W. 2d 979. As held in the *Elliff* case, *supra*:

> "In our opinion the Court of Civil Appeals was without authority to pass upon the propriety of the measure of damages adopted by the trial court for the simple reason that no such assignment was presented to the court. Although such an objection was raised in the trial court, we do not find an intimation of it brought forward to the Court of Civil Appeals. The question is therefore not before us, and our subsequent conclusions as to the rights of the parties are without reference to the correctness of the measure of damages, and we express no opinion on that question."

An examination of the Points of Error listed in the briefs by petitioners in the Texas Supreme Court and in the Court of Civil Appeals will not disclose a single federal question assigned as error to either court. Reliance for reversal was placed by petitioners on grounds of *Texas* "public policy", on a *Texas* statute, Art. 1438, R.C.S. and on the *Texas* Constitution. Texas public policy is a matter for Texas courts and legislature to determine. So also are the construction of Texas statutes and the Texas Constitution. With no provision of the Federal Constitution pointed out to it by the Application for Writ of Error, the Texas Supreme Court, under its own rules of decision, was restricted to deciding this case upon *state* grounds and was not at

liberty to express an opinion on any federal questions which might have existed if properly called to the attention of the Court.

The fact that petitioners mentioned a specific constitutional provision (the Fourteenth Amendment) in their unauthorized Second Motion for Rehearing in the Supreme Court of Texas (Brief for Petitioners' Appendix II) does not help petitioners on this application. Inasmuch as the purported constitutional rights of petitioners are there said to stem from the application of "excessive and unreasonable" gas rates to them (an assertion contrary to the record made in the trial court and on appeal to that point) it would seem clear that this federal question is, in any event, more colorable than real. Nevertheless, the settled law is that any such "federal question" raised at such a juncture is too late and gives this Court no jurisdiction. *Bonner* v. *Gorman*, 213 U.S. 86; *Stembridge* v. *Georgia*, 343 U.S. 541, 547. As held by this Honorable Court in the *Bonner* case, *supra*, (213 U.S. at page 92):

> "... Where a federal question is raised on a second appeal and a state court refuses to consider it, it comes too late (Citing cases)."

Concerning the vague charges of "monopoly" which belatedly were asserted in the District Court by an attempted amended pleading filed *after* the decision of that Court had gone against petitioners, respondent desires to point out that not only were such charges not properly preserved and presented on appeal, but, also, such grounds were not properly before even the trial court. It is the settled Texas law that summary judgments are to be determined upon the pleadings, affidavits and stipulations filed before the day of hearing in accordance with Texas Rules of Civil Procedure, 166-a and attempts to improve a litigant's position or shift his ground following the hearing of such a motion

(as, for instance, on motion for new trial) come too late and are not to be considered. *Roundtree* v. *Bridwell,* Tex. Civ. App., 269 S.W. 2d 824. Any need for delay to replead or for discovery procedures to learn the facts are to be brought to the court's attention before hearing, under Rule 166-a (f); and failure to seek the delays in the hearing provided by the rule constitutes a waiver of such matters and justifies the court in refusing to consider matters brought out later, after the ruling has been made. *Holland* v. *Lansdowne-Moody Co., Inc.,* Tex. Civ. App., 269 S.W. 2d 478. The reason for this rule in the state courts is that only by enforcing such a rule could the summary judgment procedure ever be used to bring an end to litigation. The same rules are applied in the Federal Courts under Rule 56 of the Federal Rules. *Bell* v. *Morgan,* (App. D.C., 199 F. 2d 168). In this case, petitioners announced ready on the motion for summary judgment after being given some 3 months to get ready for same. They filed their own motion for summary judgment (demonstrating the absence of fact issues) and announced "ready" on both motions. Only after an adverse decision did they (too late) file or attempt to file amendments, supplemental petitions and numerous other pleadings.

What has been said before would appear to answer all of the federal question arguments of petitioners. These matters were not presented to the State court and were not passed upon. Instead, decision was invited and was made on non-federal grounds. By pleading, assignments of error, and argument in their briefs, petitioners in the state court relied upon Texas statutes, upon Texas Anti-Trust laws and upon Texas public policy arguments. Having relied upon the state laws, they invited the state courts to decide this question upon the basis of state law. On state law the decision was made. Petitioners are in no position to

complain, and this Honorable Court has no federal question to review. *Herb* v. *Pitcairn,* 324 U.S. 117.

## II

### The Asserted Federal Questions Lack Substance

Respondent has heretofore pointed out petitioners' failure properly to present and preserve a federal question in the Texas courts. While the foregoing is deemed to be sufficient to show that no jurisdiction to review exists in this court, (*Murdock* v. *Memphis,* 20 Wall., 590, 636; *Berea College* v. *Kentucky,* 211 U.S. 45, 53; *Herb* v. *Pitcairn,* 324 U.S. 117, at pages 125, 126), it should be added that the so-called "federal questions" asserted by petitioners are insubstantial. For analysis, these asserted "federal questions" will be broken down as follows:

1. The "monopoly" question. Three competing gas distribution companies operate in the City of Houston (Tr. p. 286). The sole factual basis for the charge of monopoly is that when one utility raised its rate, so did the other. The distribution of gas in Texas is a regulated industry. Articles 1175, 6050, et seq., Revised Civil Statutes of Texas. Petitioners made no complaint of their rates to the regulating bodies. Petitioners admitted in the trial court and on appeal that they were not contending that the rates paid by them were excessive or unreasonable for the service given (Depos. of Hibbetts, p. 43). No damages or injuries to their business from monopoly were alleged or advanced at any time. No injunction to restrain any illegal combination or trust in restraint of trade was sought by petitioners. Both respondent's and petitioners' businesses are intrastate. Petitioners do not contend that the Federal Constitution prohibits monopolies nor do they show wherein any Federal Statute has application.

2. That respondent insisted upon a "grossly unfair and unjust contract lacking mutuality." The feature of the contract objected to is the right to terminate a contract upon 30 days' notice. The right was not unilateral but was available to both petitioners and respondents. Subject to the right of the cities and the Texas Railroad Commission to fix rate schedules at any time, by statute gas utilities in Texas have the power to fix their own rates and further have the power to contract with their customers. Article 1435, Revised Civil Statutes of Texas. Texas law recognizes such contracts as valid and there is no Texas policy against a mutual right of termination of a contract. Cf. *United Gas Corporation* v. *Shepherd Laundries Co., Inc.,* Tex. Sup. Ct., 189 S.W. 2d 485.

3. That the use of summary judgment procedure denied petitioners the right of trial by jury in violation of the Constitution of the United States. Rule 166-a, Texas Rules of Civil Procedure was adopted from the Federal Rule 56 almost verbatim. This Court has long since held that such summary judgment procedures are constitutional and not open to the objection made by petitioners. *Fidelity & Deposit Co. of Maryland* v. *U. S.,* 187 U.S. 315. Trial by jury under the Constitution is limited to genuine issues of material fact. No such issues were present in this case. Petitioners themselves filed a motion for summary judgment and announced "ready" on both motions without raising, by affidavit or otherwise, any disputed fact issues material to a decision of the case. As stated in the opinion of the Court of Civil Appeals of Texas (Brief for Petitioners' Appendix 13):

> "By point five, appellants complain of the asserted error of the trial court in granting the summary judgments favorable to appellee because of the existence of various disputed issues of fact. From their argument

> under such point, it is clear that appellants do not contend that any dispute exists relative to those facts which have been stated heretofore and upon which we base our conclusions . . . By pleading, by depositions, and by admissions of fact, appellants have limited their cause of action to one based upon discrimination which they contend amounts to an overcharge. We have concluded that Schedule CI-303 and 404 reflect the established rates applicable to appellants. Therefore, having failed to allege injury in tort, and the undisputed facts proving the absence of such injury or damages, the existence of the facts to which appellants fifth and sixth points are directed, even if disputed, are immaterial in the determination of their rights."

Petitioners did not even take issue with the above statement of their position in their assignments of error on application for writ of error to the Texas Supreme Court.

4. That the rates applied to them are excessive and unreasonable as a matter of law depriving petitioners of equal protection of the laws and of property in violation of the 14th Amendment. As has been pointed out heretofore, this belated assertion contradicted the record made in the trial court where petitioners repeatedly stated they were not asserting such rates to be unreasonable or excessive.

5. That the decision of the Texas Court conflicts with *United Gas Pipeline Co.* v. *Mobile Gas Service Corporation,* 76 S. Ct. 373, 100 L. Ed. 291 (decided by this Honorable Court February 27, 1956). This case is not argued in petitioners' brief beyond the bare assertion that it supports their position. The case has no application to the present one. This Court there construed the Natural Gas Act, a *Federal* statute, as not permitting a natural gas company, by unilateral action, to abrogate its own private contracts for the supplying of gas by filing a new rate schedule with the Federal Power Commission. Since (a) it is not claimed

that the Natural Gas Act has application to the industrial gas rates of an intrastate gas distribution company in Houston, Texas, and (b) petitioners have no contracts with respondent requiring gas to be served at the 202 rate they seek to have applied, the decision of this Honorable Court in the *United Gas Pipeline* case is obviously not apropos of anything involved in this case. As this Court held in the *United Gas Pipeline* case, *supra:*

> "... We hold that the Natural Gas Act does not give natural gas companies the right to change their rate contracts by their own unilateral action."
>
> * * *
>
> "... it follows that the new schedule filed by United was a nullity insofar as it purported to change the rate *set by its contract with Mobile* ..."

**Conclusion**

The decision of the Texas court was not based upon any federal right. Ample non-federal grounds for decision existed, including the 10-year settled Texas rule that before any recovery for discrimination in gas rates might be had actual damage and competitive losses must be shown. *United Gas Corporation* v. *Shepherd Laundries Co.*, Tex. Sup. Ct., 189 S.W. 2d 485. Of necessity in this case, the Texas courts decided this case upon non-federal grounds since no federal grounds were presented, briefed or available for decision. Even the so-called "federal questions" belatedly asserted by petitioners for purposes of their application for a writ of certiorari in this Court are insubstantial. The opinion of the Texas Court of Civil Appeals shows that every substantial right of petitioners was carefully considered and weighed before the case was decided against them. The Texas Supreme Court thereafter refused to grant a writ of error. In these circumstances it is re-

spectfully submitted that the application for writ of certiorari should be denied and dismissed.

Respectfully submitted,

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**Certificate Of Service**

Copies of the above and foregoing Brief in Opposition were delivered to attorney for Petitioners, Fred W. Moore, 1506 South Coast Life Bldg., Houston 2, Texas, this 5th day of July, 1956.

.....

LEON JAWORSKI
*Attorney for Respondent,*
Houston Natural Gas Corporation.

JUL 20 1956
JOHN T. FEY, Clerk

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 146

MRS. BETHEL LESLIE ET AL.,
*Petitioners,*

vs.

HOUSTON NATURAL GAS CORPORATION,
*Respondent.*

## PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

DAN MOODY,
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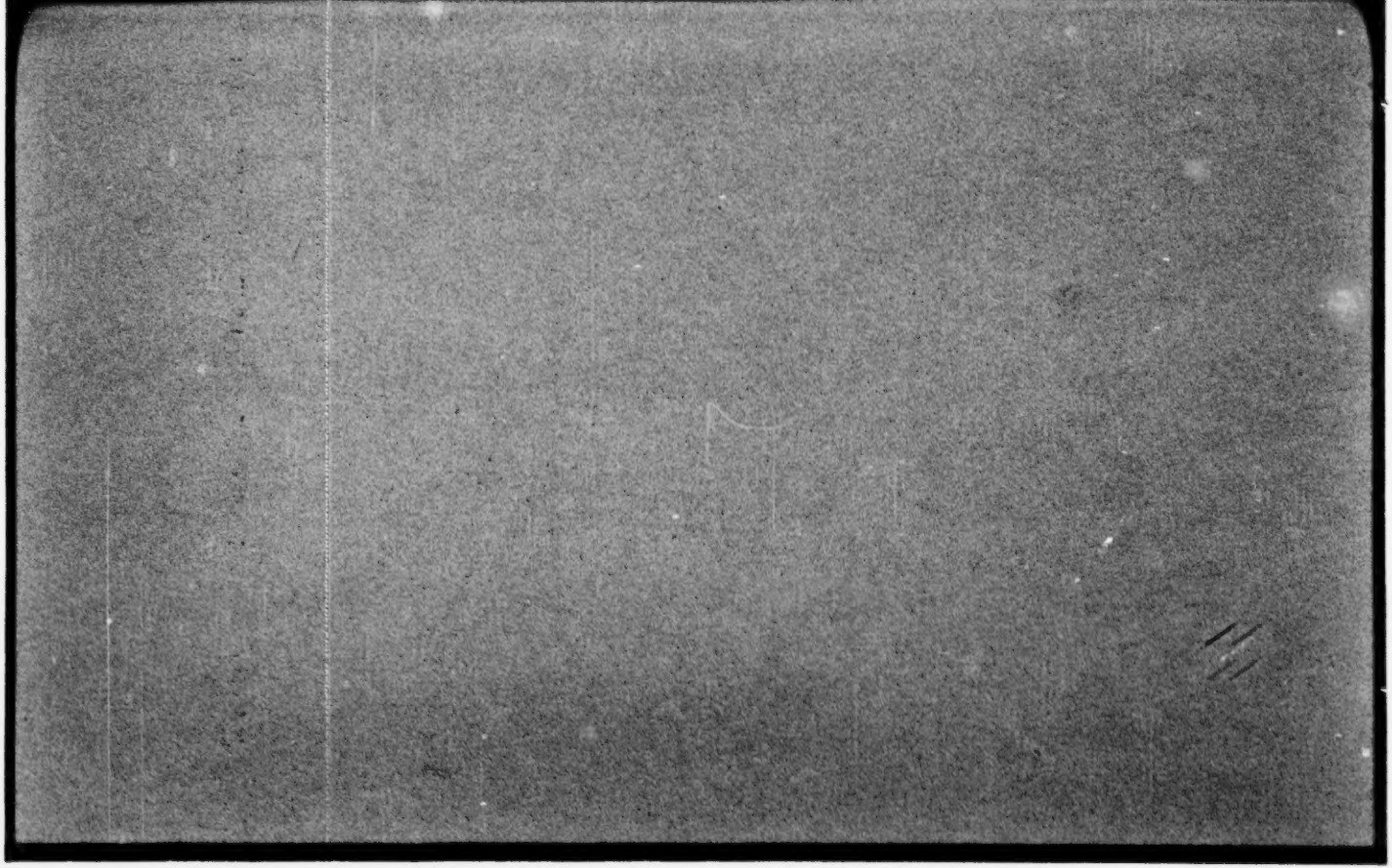

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

**No.** .....

MRS. BETHEL LESLIE ET AL.,
*Petitioners,*

vs.

HOUSTON NATURAL GAS CORPORATION,
*Respondent.*

## PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Mrs. Bethel Leslie *et al.*, ask the Court's permission to file this reply to respondent's brief in opposition to the petition for writ of certiorari, because of various questions raised therein not discussed in the petition.

### I.

### This Action Is Not Moot.

Respondent alleges that this controversy is moot because it was brought primarily for an injunction to re-

strain respondent from collecting any charge but the 202 rate as long as any consumer similarly situated in the same class, that is industrial consumers, purchased gas at that rate.

In urging this contention respondent ignores petitioners' suit for overcharges or over-payments and for declaratory judgment involving the long period from date of the final judgment in the trial court, August 6, 1954, to the present time during which a very large number of industrial consumers enjoyed the low 202 rate while the petitioners were being charged either the 303 or 404 rates. Certainly these actions are not moot.

Houston Packing Company, which is a competitor of Pepper Rendering Company and Standard Rendering Company, enjoyed the 202 rate under a contract which recently expired on June 1, 1956. Its monthly consumption averaged about 19,000 MCF.

Baylor College of Medicine and Hermann Hospital were both charged the industrial rate and their contracts expired July 15, 1956. The average take of Baylor College of Medicine was about 800 MCF per month and Hermann Hospital takes an average of about 9,000 MCF per month.

Respondent does mention the Asbestos Company of Texas which consumes an average of between 3,500 and 7,000 MCF per month and will enjoy the low 202 rate under contract until January 1, 1957.

When this court refused petitioners' application for a stay a majority of them were forced to pay the judgment rendered against them under protest. Some of them however up to the present time have not made such payment, which in any event would not make this action moot.

Four of the petitioners, Burleson, McKinley, Barr and Bramble, who are large consumers, paid the 303 rate and sued herein to recover the difference.

It is true that the remaining petitioners did file suit herein primarily to restrain and enjoin the respondent from cutting off the gas being furnished petitioners or from interfering in any way with the delivery of gas to petitioners and from collecting penalties, gross rates and higher rates than the 202 rate as long as that rate continued in existence. It is still in existence.

The majority of petitioners paid the 202 rate to the utility pending this action under an agreement that such payment was without prejudice to the respective contentions of petitioners and respondent. We contend this suit is still pending but respondent forced payment of the judgment when this court denied a stay. The payment under compulsion does not destroy the suit.

In their first supplemental petition (filed by petitioners prior to the first summary judgment) petitioners sued for certain specific amounts due the respective petitioners as overcharges and by the first summary judgment were denied any relief with reference to same.

In petitioners' first amended supplemental petition and petitioners' second supplemental petition they specifically sued for overpayments or overcharges. These petitions were filed subsequent to the first summary judgment but prior to the entry of the second summary judgment and were denied. These actions are not moot but are still pending.

In petitioners' first amended original petition, filed subsequent to the first summary judgment and prior to the second summary judgment, petitioners sued for overpayments and overcharges, setting out same specifically,

that is specific amounts for the respective petitioners, and the court refused to consider the amended petition, but on the contrary struck same on motion of respondent. All these errors have been carried forward continuously in the appellate courts and argued in various briefs.

For the respondent therefore to contend under the status of this record that this cause is moot merely because there will be only one large industrial consumer enjoying the 202 rate at the time this court considers this case in the October, 1956, term, is obviously erroneous. It is equally erroneous to say that this cause is moot because this court denied petitioners' motion to stay. The payments made under the judgment subsequent to that denial were made under protest.

Respondent has recently sued certain of the petitioners and is threatening to sue the others with reference to gas furnished subsequent to the date of the decree, August 6, 1954, up to the present time, alleging that the 404 rate applies solely because petitioners have no written contracts.

II.

**Federal Questions Which Were Presented, Considered and Acted Upon in the Trial and Appellate Courts.**

Petitioners in their second supplemental petition excepted to the trial court's refusal to give petitioners a trial by jury in violation of the Constitution of the United States. This exception in the record is sufficient to raise that question, particularly in view of the fact that the trial court by its order of August 5, 1954, expressly overruled and denied all pleas and exceptions set forth in their second supplemental petition, said order reciting that all of said pleas and exceptions were duly submitted to the

court and were overruled and refused, to which action petitioners then and there in open court excepted.

After the rendering of the first summary judgment petitioners filed a motion for rehearing and new trial in which as one of the grounds it was urged that petitioners had been unlawfully denied the right of trial by jury. That motion was submitted to the court on December 29, 1953, and overruled by the court and the order overruling same recites that the petitioners in open court excepted and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston.

The Court of Civil Appeals and later the Supreme Court of Texas, by denying petitioners' application for writ of error and holding that the summary judgments were proper, held in effect that there were no fact issues and therefore there was nothing for the jury to consider.

Rule 515, T. R. C. P., provides that motions for rehearing shall be filed within fifteen days after the date of the rendition of the judgment or decision of the Texas Supreme Court. The first motion for rehearing filed by petitioners in the Texas Supreme Court was denied March 14, 1956. Within fifteen days thereafter, that is on March 23, 1956, petitioners filed their second motion for rehearing in which they particularly pled the 14th Amendment to the United States Constitution and cited a recent decision of the United States Supreme Court by Justice Harlan, styled *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 76 S. Ct. 373, reported in the March 1, 1956, advance sheet of that reporter. The Supreme Court of Texas held the second motion for rehearing under consideration from March 23, 1956, until May 9, 1956, when the court finally refused to consider it. We argued said decision of this

court in that motion to the Supreme Court of Texas. See Appendix to Petition for Certiorari.

At the time this court decided said case, February 27, 1956, the first motion for rehearing had been presented to the Texas Supreme Court and was under consideration, having been filed in December, 1955.

We presented the decision just referred to by this court to the Texas Supreme Court at the first opportunity, that is in our second motion for rehearing which was filed within the fifteen day period required by the rules after the court overruled the first motion for rehearing.

By refusing to consider the second motion the Supreme Court of Texas, in effect, held no more than it held before, namely, it denied the writ of error without writing any opinion. Certainly that court must have considered the second motion for rehearing in view of the long time that it held the same.

We urge that the following rule quoted from the decision of this court in *Great Northern Ry. Co.* v. *Sunburst Refining Co.*, 53 S. Ct. 145, 287 U. S. 358, applies, viz.:

> "The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered and decided (*Consolidated Turnpike Co.* v. *Norfolk & O. V. Ry. Co.*, 228 U. S. 326, 334, 33 S. Ct. 510, 57 L. Ed. 857; *Cumberland Coal Co.* v. *Board*, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146), nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right (*Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 678, 50 S. Ct. 451, 74 L. Ed. 1107; *Missouri ex rel. Missouri Insurance Co.* v. *Gehner*, 281 U. S.

313, 320, 50 S. Ct. 326, 74 L. Ed. 870; *American Surety Co.* v. *Baldwin, supra*). This case is clearly within the second of these exceptions, if it is not also within the first. We have seen that the assault upon the judgment is made along two lines. The first is a challenge to the constitutional validity of the ruling in the Doney Case, and involves a misconception of the decision in *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co., supra.* The second is a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others. This latter objection the petitioner could not make in advance of the event."

We are fully aware that the 14th Amendment ordinarily applies only to restrictions by a state or unconstitutional action by agencies of the state but where, as here, the public utilities operate under a public franchise, are monopolistic in character and no other governmental agency, that is neither the City of Houston nor the Railroad Commission, made any attempt to fix the rate applicable to industrial consumers, then certainly the action of the utility in fixing such rate was, in effect, an action of an arm of the government. The industrial consumers are entirely at the mercy of the two utilities in this instance, that is the Houston Natural Gas Corporation and the United Gas Corporation, which are following identical policies, charging identical rates and have had identical rules for a long period of time.

The petitioners filed a motion for summary judgment only with reference to the applicability of the rates and at no time did petitioners ask for a summary judgment involving the numerous fact issues concerning unlawful

combinations, conspiracies in restraint of trade and the other fact questions which the trial court foreclosed with two different summary judgments in favor of respondent.

Surely the question of right of trial by jury is indissoluble with the question of whether there were any fact issues raised. If there were fact issues the same would be submitted to a jury as requested and the holding that no fact issues existed is, in effect, a holding that no trial by jury was authorized, all in violation of the Federal Constitution.

III.

**Not Necessary for Petitioners to First Present These Questions to City of Houston or Texas Railroad Commission.**

The Third question presented in respondent's brief which was not discussed in the petition for writ of certiorari is that petitioners made no complaint as to the rates charged them to the City of Houston or the Texas Railroad Commission. Respondent raised that issue in its plea in abatement and the trial court overruled same but at no time did respondent file any cross-assignment of error so as to properly present that question in the Court of Civil Appeals or the Supreme Court of Texas.

The Supreme Court of Texas has recognized that neither of said agencies would consider industrial rates. Obviously therefore, such an appeal would have been fruitless and useless procedure. In the decision relied upon so heavily by respondent, *United Gas Corp.* v. *Shepherd Laundries Co., Inc.*, (Tex.) 189 S. W. 2d 485, that court said:

> "Any rates fixed by the utility company may be supplanted by rates fixed by the city or the Railroad

Commission of Texas as provided by law. Art. 6053, *et seq.*, Vernon's Ann. Civ. St. But neither of such governing bodies ever fixed any rates in Houston for industrial customers. The Railroad Commission has uniformly refused to fix rates for the sale of gas to industrial consumers anywhere in Texas. An example of such policy and the reason therefor will be found in the Commission's opinion in *Re Community Natural Gas Co.*, 15 P. U. R., N. S., 149, 164, as follows:

> 'It is not our purpose or intention in this proceeding to fix the purchase price or sale price for industrial gas for the reason that the sale price for industrial gas fluctuates along with the price of other competitive fuels.'" (p. 486).

Respondent makes much of the fact that petitioners have not attacked the rates as being unreasonable in themselves, that is petitioners have refused to try this case as a rate case with reference to such matters as investment, return on the investment, profit to the utility, etc.

Since the rates involved are below the maximum rates fixed by the City of Houston, which makes no attempt to regulate industrial rates, and also because the Railroad Commission does not act with reference to industrial rates there would be nothing gained by applying to those bodies.

We do contend however, that the rates are discriminatory and therefore as a matter of law unreasonable in line with the following quotation also taken from that case:

> "As will be seen from the authorities hereinafter discussed, a discrimination may arise from a mere

> inequality in rates but an overcharge arises only when the rate charged is unreasonable in and of itself, irrespective of the rate exacted of others, *or when it is in excess of the rate established for the particular customer or business.*" (p. 487—emphasis ours).

Since a discrimination existed because the utility refused to give petitioners the benefit of the lowest established rate, that is, the contract rate, an overcharge arose with reference to those petitioners who paid the higher rates than the 202 or 202-L. Some of the petitioners paid the higher rate for a period and went back to the 202. Other petitioners paid the 303 rate and sued to recover the difference. The 202 rates were the established rates for industrial consumers and consequently the charges reflected by the 303 and 404 rates were unreasonable as a matter of law.

The following quotation from 73 C. J. S. 350, applies, viz.:

> "Preliminary resort to an administrative agency is not necessary where the administrative remedy is not exclusive."

Here there is no administrative remedy and no administrative body attempted to fix the rates in question or take jurisdiction over same.

There is no provision in the Texas statutes whereby the Texas Railroad Commission can award relief for discrimination. In certain cases the Interstate Commerce Commission can award damages for discrimination, which is not true of the Texas Railroad Commission.

In the *City of El Paso* v. *El Paso City Lines*, 227 S. W. 2d 278, the court considered an ordinance which provided that no public utility operating within the city limits of

the City of El Paso shall retain for its own use any sums collected in excess of a fair return upon its investment and that the City of El Paso should collect such excess and distribute same among the customers paying the excess charges. In this connection the court held as follows:

> "It has been held that inquiry as to justness, reasonableness or discriminatory effect of rate as affects reimbursements constitutes judicial inquiry not within the authority of the Railroad Commission. *Missouri, Kansas & T. R. Co. of Texas* v. *Railway Commission*, Tex. Civ. App., 3 S. W. 2d 489; *Producers Refining Co.* v. *Missouri, K. & T. Ry. Co.*, Tex. Com. App., 13 S. W. 2d 679, 680." (p. 285).

The court also held in that case that the power to regulate charges and fares of public service companies given home rule cities did not authorize power in the city to collect the so-called excess funds in trust resulting from overpayments to the utility, and reimburse the consumers who paid in such excess.

The court said in that case that the power to fix rates must be exercised in a certain and definite manner and that rates must operate prospectively rather than retrospectively. In *Missouri, Kansas & Texas R. R.* v. *Railroad Commission*, 3 S. W. 2d 489, the court considered an action to enjoin the enforcement of a commission order awarding to Clayton Oil & Refining Company $15,137.73 and to Producers Refining Company $25,005.48, representing repayment on account of unjust discrimination and rates on casing head gasoline. The court held that the Railroad Commission had no authority to make any such reparation; that such matters were entirely judicial in nature. The court said in part in that case:

"On the other hand, the unjustness or unreasonableness or discriminatory effect of an existing rate which is attacked not under these statutes or otherwise in a direct proceeding to annul it or compel its modification, but for the purpose of reimbursement for unjust, unreasonable, or discriminatory charges theretofore paid under it, constitutes a judicial inquiry. And, while ample express powers are conferred upon the commission as a legislative rate-making body, we find nothing in the act which confers upon it the judicial or *quasi* judicial power to reopen a rate it has fixed and determine its unreasonableness, unjustness, or discriminatory effect in so far as it has operated upon transactions that have already taken place. All of the statutory provisions in regard to rate-making powers and duties of the commission appear to be legislative in character and prospective in operation." (p. 494).

## CONCLUSION.

The Texas courts could not sustain the contentions of the respondent without violating certain constitutional rights of the petitioners. The opinion of the Court of Civil Appeals rendered in this litigation is unique. We contend that it is the first and only decision in Texas which holds, (1) that a gas consumer cannot obtain a writ of injunction in Texas to prevent unlawful discrimination by a public utility, namely, the charging of a higher rate than the lowest established rate, and (2) it is the only decision in Texas which holds that before you can obtain an injunction you must first allege and prove your damages in accordance with the decision in *United Gas Corp.* v. *Shepherd Laundries Co., Inc.,* (Tex.) 189 S. W. 2d 485, that is, compensatory damages because of competitive loss.

Although partial summary judgments are recognized in Texas, nevertheless a final summary judgment under the Texas authorities should be granted only when there is no disputed fact issue and the party making the motion is entitled thereto as a matter of law. *Gulbenkian* v. *Penn*, 151 Tex. 412, 252 S. W. 2d 929. The existence of but a single genuine issue as to any material fact is sufficient to preclude entry of a summary judgment. *Bolton* v. *Foreman*, 263 S. W. 2d 618, ref. n. r. e.; *Loud* v. *Sears, Roebuck & Co.*, 262 S. W. 2d 548; *Ware* v. *Wright*, 252 S. W. 2d 1003; Rule 166A, T. R. C. P.

The Texas Supreme Court, in effect, gave its tacit approval to this amazing decision by denying petitioners' application for writ of error, thereby denying petitioners the protection of the 7th and 14th Amendments to the Federal Constitution.

Whenever a court holds that the existence or non-existence of a written contract is a proper basis for a difference in rate charge or service by a utility then that court is violating the Federal Constitution and destroying the constitutional rights of those consumers of the same class who have no written contracts. It is impossible to make such a ruling without violating the rights of the citizens guaranteed by the Federal Constitution.

Petitioners have never had a trial. The lower court was ruthless in its rulings and not only granted two summary judgments against petitioners but sustained a motion to strike plaintiffs' first amended original petition long after it was filed. To deny petitioners the right to amend their pleading under the circumstances shows clearly the wholly erroneous theory or conception of the case by the trial judge.

We ask that the petition for writ of certiorari be granted and that this cause be reversed and remanded to the lower court for retrial.

Respectfully submitted,

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Copies of the above Reply were delivered to counsel for respondent, Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas, this ~~20~~ 24th day of July, 1956.

.....,

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